SOUTHERN BANK BHD

v.

NG KENG LIAN & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
FAIZA TAMBY CHIK J
[ORIGINATING MOTION NO: R2-25-78-2000]
26 SEPTEMBER 2001

LABOUR LAW: *Employment - Constructive dismissal - Whether employee who considers himself dismissed must notify employer before making representation to D-G of Industrial Relations - Whether representation made before dismissal is premature - Whether Industrial Court seised of jurisdiction to hear claim of constructive dismissal based on premature representation - At what point is an employee constructively dismissed - Contract test, principles and application - Industrial Relations Act 1967, s. 20(1), (1A)*

ADMINISTRATIVE LAW: *Judicial review - Power of High Court - Inferences drawn by tribunal from evidence - Whether High Court can disagree with tribunal's inferences - Whether High Court exercising supervisory jurisdiction can draw its own inferences - Certiorari - Error of law - Irrationality or Wednesbury unreasonableness - Industrial Court*

The principal issue of law in the instant application for *certiorari* to quash an award of the Industrial Court was: whether an employee who considers himself to have been dismissed (constructively) must first notify his employer of his stand so taken before he can proceed to make a representation under s. 20(1) of the Industrial Relations Act 1967 ('the IRA'). In the award herein sought to be quashed, the Industrial Court had held that it was unnecessary for such an employee to do so.

Held:

[1] The statutory regime housed in s. 20(1) and (1A) of the IRA (which applies in respect of both outright and constructive dismissals) clearly prescribes a 'dismissal before representation' formula. Consequently, a representation that precedes or is made before a dismissal is in law premature and thus null and void. The Industrial Court has **no** jurisdiction to hear a claim that is anchored on a premature representation. Hence, an employee who considers himself dismissed (constructively) must first notify his employer, by words or conduct, of his stand so taken before he can make a representation under s. 20(1) of the IRA. (pp 517 b, 524 i, 525 a-d & 535 f)

[2] The Industrial Court committed an error of law and acted in excess of its jurisdiction when it failed to take into account relevant and undisputed facts and concluded that the respondent employee's representation was not premature. The facts plainly showed that the respondent only considered herself to have been dismissed by the applicant on 25 September 1998 (*via* her letter of the same date to the applicant) and **not** on 7 September 1998 as she had claimed. It was in evidence that the respondent had made her representation to the D-G of Industrial Relations on 19 September 1998, *ie*, six days before her 'dismissal' on 25 September 1998. (pp 526 g, 527 a-i, 528 a, e, 529 d-e & 534 g-h)

[3] Although the Industrial Court had accepted that the proper test for cases of constructive dismissals in Malaysia is the common law 'contract test', yet it did not apply the said test to the facts of the present case. This omission was an error of law. The Industrial Court should have asked itself the question whether the respondent was contractually obliged to notify the applicant that she had considered herself dismissed before making her representation. (pp 530 h-i, 531 a, f-i, 532 a-h, 533 a-f & 534 c-d)

[4] In judicial review proceedings the High Court can disagree with the Industrial Court on the conclusions or inferences drawn by the latter from the evidence placed before it on the ground that no reasonable tribunal similarly circumstanced would have arrived at such a conclusion. An erroneous inference from proved or admitted facts is an error of law. (pp 523 a-i, 524 a-e, 528 a-d, f-i, 529 a-c & 535 g-i)

[Certiorari issued.]

Case(s) referred to:

Airspace Management Services Sdn Bhd v. Col (B) Harbans Singh [2000] 4 CLJ 77 ***(foll)***

Amanah Butler v. Yike Chee Wah [1997] 2 CLJ 79 ***(refd)***

Ang Beng Teik v. Pan Global Textiles [1996] 4 CLJ 313 ***(refd)***

Anwar Abdul Rahim v. Bayer (M) Sdn Bhd [1998] 2 CLJ 197 ***(foll)***

Chirstoph Hoezl v. Langkawi Island Resort Sdn Bhd [1998] 6 MLJ 162 ***(foll)***

Council of Civil Service Union & Ors v. Minister for the Civil Service (CCSU) [1985] AC 374 ***(refd)***

Edwards v. Surrey Police [1999] IRLR 456 ***(foll)***

Funai Electric (M) Sdn Bhd v. Saliah Ahmad (Unreported) ***(refd)***

Harpers Trading (M) Sdn Bhd v. National Union of Commercial Workers [1991] 2 CLJ 881; [1991] 1 CLJ (Rep) 159 ***(refd)***

Harris Solid State (M) Sdn Bhd v. Bruno Gentil [1996] 4 CLJ 747 ***(refd)***

Hoh Kiang Ngan v. Mahkamah Perusahaan Malaysia & Anor [1994] 3 MLJ 369 ***(refd)***

Holland v. Glendale Industries Ltd [1998] ICR 493 ***(refd)***
Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor [1999] 3 CLJ 65 ***(refd)***
Moo Ng v. Kiwi Products Sdn Bhd, Johor [1998] 3 CLJ 475 ***(foll)***
Kumpulan Perangsang Selangor Bhd v. Zaid Hj Mohd Noh [1997] 2 CLJ 11 ***(refd)***
R Ramachandran v. Industrial Court of Malaysia & Anor [1997] 1 CLJ 147 ***(refd)***
Shaw Computer and Management Services Sdn Bhd v. Cheong Kiew [1989] 1 ILR 261 ***(refd)***
SP Tiwari v. State of Bihar [1993] II LLJ 1162 ***(refd)***
Supermix Concrete (M) Bhd v. Teoh Boon Beng [1978] ILR 274 ***(foll)***
Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers Union [1995] 2 CLJ 748 ***(refd)***
Wong Chee Hong v. Cathay Organisation (M) Sdn Bhd [1988] 1 CLJ 45; [1988] 1 CLJ (Rep) 298 ***(refd)***
Wong Yuen Hock v. Syarikat Hong Leong Assurance [1995] 3 CLJ 344 ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 25
Industrial Relations Act 1967, ss. 20(1A), 29(1)

Other source(s) referred to:
Wade & Forsyth, *Administrative LasAdministrative Law*, 1994, 7th edn, p 312

For the applicant - Steven Thiru (B Anushana & S Nanthabalan); M/s Shook Lin & Bok
For the respondent - V Rajasingam; M/s Raja Singam & Co

Reported by Gan Peng Chiang

JUDGMENT

Faiza Tamby Chik J:

This application (encl. 8) raises a very fundamental issue in Employment Law. It concerns basic principles to be applied in cases of constructive dismissal. The issue may be cast as follows:

> Is an employee, who considers herself as having been constructively dismissed obliged to first inform her employer or put her employer on notice of her stand (that she has been so dismissed) before she can make a representation under section 20(1) of the Industrial Relations Act 1967 ("the IRA") read with section 20(1A) of the IRA?

It was contended before the Industrial Court (the 2nd respondent), on a preliminary objection, that a representation by an employee (under s. 20(1) read with s. 20(1A) of the IRA) that she was constructively dismissed before she informed her employer of her stand was a premature representation and, accordingly, the Industrial Court would not be seized with jurisdiction to adjudicate the claim of constructive dismissal based on

the premature representation. The Industrial Court, however, answered the issue in the negative when it decided that an employee is not required to inform her employer that she considered herself as having been constructively dismissed before making the representation under s. 20(1) read with s. 20(1A) of the IRA. The Industrial Court therefore found that the claim was not premature and refused the applicant's preliminary objection. If the Industrial Court is correct in its view, then any employee can walk out of employment for whatever reasons (eg, for a better job) without first informing her employer or giving notice to her employer and then when things do not go the employee's way, the employee can say that he or she was in fact constructively dismissed by the employer. This would be an abuse of a claim of constructive dismissal. Equally, as the case before the court here, an employee faced with serious allegations of misconduct could give the impression that she is submitting to the disciplinary process of the employer. But at the same time, she could make a representation under the IRA that she has been constructively dismissed by reason of the disciplinary process, without first informing her employer of her stand. It is only when she finds that the disciplinary action is not going her way that she informs her employer that she considers herself as having been constructively dismissed and that she had already made her representation. This is also an abuse of a genuine claim of constructive dismissal.

The issue has wide ramifications. It strikes at the very heart of the statutory regime housed in ss. 20(1) and 20(1A) of the IRA which gives the Industrial Court jurisdiction to her dismissal cases. The decision of the Industrial Court on the issue is also, as may be seen later, incompatible with the contract test in constructive dismissal cases as postulated in the leading Supreme Court case of *Wong Chee Hong v. Cathay Organisation (M) Sdn. Bhd.* [1988] 1 CLJ 45; [1988] 1 CLJ (Rep) 298. The matter therefore resolves itself into a very important issue of jurisdiction of the Industrial Court in constructive dismissal cases under s. 20(1) and 20(1A) of the IRA. Hence, the instant application. The application (encl. 8) is supported by the statement (encl. 7) and the affidavit of Sunny Lim (encl. 6). The 1st respondent has filed and served one affidavit in reply affirmed on 4 July 2001 and in response to that, the applicant filed and served its affidavit affirmed on 20 July 2001.

The background facts of the case are as follows: The 1st respondent was employed as a Branch Manager of the applicant bank at all material times. The 1st respondent was informed on 19 August 1998 of the investigations that the bank was carrying out at her branch in Kuala Terengganu involving her (see p. 90, encl. 6). The 1st respondent agreed to go on leave from

20 August 1998 to 30 August 1998 to facilitate the investigations (see p. 90 and pp. 116 to 117, encl.). As a result of the investigations, the 1st respondent was suspended on 26 August 1998 for serious allegations of misconduct (see pp. 118-119, encl. 6). The 1st respondent duly accepted the suspension on 1 September 1998 (see p. 120, encl. 6). The sequence of events set out above are borne out in the applicant's letter issued by its Manager (Branch Operations) Encik Mohd. Osman at p. 90, encl. 6. The material part reads as follows:

> The meeting that you had with Mr. N. Selvarajah, Mr. Tay Boon Kuan and me on 19th August 1998 in Kuala Lumpur was for the purpose of informing you of the preliminary results of the investigation and to seek your explanation in respect of your alleged misconduct and breach of ethical practices inconsistent with a Branch Manager. In fact you have verbally admitted to some of the wrongdoings. There were no threats of any kind that were made against you at that meeting. As investigations have not been completed, you were offered the option of going on leave instead of a suspension so that you may not be embarrassed. You have voluntarily agreed to our suggestion and submitted the Bank's application form for leave on 19th August 1998. Your suspension on 26th August 1998 was subsequently deemed necessary as further investigations revealed that this course of action was appropriate in light of the severity of your misconduct.

The statements above have not been denied by the 1st respondent including the fact that she had "verbally admitted to some of the wrongdoings". The applicant then issued show cause letters to the 1st respondent on 9 September 1998 (pp. 121-147, encl. 6) and 18 September 1998 (pp. 148-150, encl. 6). Then, and it is very important to note this, on 19 September 1998 the 1st respondent made a representation under s. 20(1) of the IRA to the Industrial Relations Department that she has been dismissed. This is evident from the letter from the department (see pp. 26-29, encl. 6) where it is stated:

> **Representasi Untuk Diambil Balik Bekerja Di bawah Seksyen 20 Akta Perhubungan Perusahaan 1967**
>
> Adalah dengan hormatnya dimaklumkan bahwa pada 19 September 1998, Jabatan ini telah menerima representasi yang tersebut di atas dari Ms. Ng Keng Lian. (see p. 26, encl. 6)

It may also be noted that according to the 1st respondent, she was dismissed on 7 September 1998. This is found in a later letter of the department (see p. 42 encl. 6) which is intituled:

> Rujukan ke Mahkamah Perusahaan oleh Y.B. Menteri Sumber Manusia mengenai Perkembangan Kerja Cik Ng Keng Lian, 1829, Jalan 11, Taman Padang Midin, 21400 Kuala Terengganu, Terengganu oleh Southern Bank Berhad, 104A & B, Jalan Sultan Ismail, 20200 Kuala Terengganu pada 7 September 1998.

It is common ground therefore that the 1st respondent made the representation on 19 September 1998 (where she alleges she was dismissed on 7 September 1998) without first informing or notifying the applicant, her employer, that she considered herself as having been dismissed from employment by the applicant. The Industrial Court accepted this as a fact (see pp. 331-334, encl. 6). Next, and notwithstanding the fact that she had purportedly considered herself as having been dismissed on 7 September 1998, the 1st respondent replied to the show cause letters (referred to in para 2.5 above) on 20 September 1998 and states:

> **Re: NOTICE TO SHOW CAUSE**
>
> I refer to your letter dated 9th September 1998.
>
> I deny all allegations contained therein.
>
> Thank you.

(See p. 30, encl. 6).

It may be immediately noted from the 1st respondent's letter at p. 30, encl. 6 that she does not state that she considered herself as having been constructively dismissed on 7 September 1998 or that she had already made a representation under the IRA on 19 September 1998. Thus, even as at 20 September 1998 (the date of the 1st respondent's aforesaid letter at p. 30, encl. 6), the applicant was completely in the dark and did not know that the 1st respondent had already considered herself as having been dismissed by the applicant on 7 September 1998. The applicant also did not know of the 1st respondent's representation of 19 September 1998. Then, on 22 September 1998 the 1st respondent wrote again to the applicant but she made no mention of either the purported dismissal or the representation (see p. 3, encl. 6). As the applicant had no knowledge of the 1st respondent's stand, it replied to the 1st respondent's letter of 22 September 1998 (p. 31 encl. 6) as it would to any of its employee similarly circumstanced (see pp. 89-91, encl. 6 and pp. 153-154, encl. 6).

The next important date to note is 25 September 1998. It is the first time the 1st respondent took the stand that she was constructively dismissed. Her letter of 25 September 1998 at p. 22, encl. 6 states:

> I refer to your letter dated 22nd September 1998 and addressed to me.
>
> The manner and mode your goodselves conducted the purported investigations in respect of the purported allegations tantamount to blatant disrespect and breach of natural justice wherein with due respect I construe that I was dismissed constructively.

> In the premise, I have made my representation to the relevant Ministry wherein in due course your goodselves will be communicated.

Three important points come to the fore from this letter:

(1) She does not state that she had in fact considered herself as having been dismissed by the applicant on 7 September 1998, as she contends now. (See also para. 3, amended statement of case at p. 92, encl. 6);

(2) It cannot be denied that his was the first time that the applicant came to know of the 1st respondent's stand. This is confirmed by the 1st respondent not denying the following averment of the applicant in para. 5 p. 14, encl. 6:

> I wish to categorically state that at no time whatsoever before her letter of 25.9.1998 (exhibit SL1 herein) did the 1st Respondent give notice, or inform, the Applicant of her alleged claim of constructive dismissal. Indeed, the 1st Respondent's conduct at all material times after her said representation on 19.9.1998 and prior to her letter of 25.9.1998 was consistent with her position as an employee of the Applicant.

(3) She also confirmed that she had already made the representation. It is therefore beyond doubt that the representation was made before she notified the applicant of her stand that she had been constructively dismissed by the applicant.

The applicant expressed its surprise over the 1st respondent's belated stand. (See pp. 159-161, encl. 6). At p. 160, encl. 6 the applicant pointedly noted:

> The Bank's efforts in affording you the right to be heard, as stated above, and your conduct in refusing to avail yourself of the opportunity to defend yourself, also as stated above, disentitles you from alleging that there has been a breach of natural justice. At all events, the Bank denies breaching any principle of natural justice. Accordingly, your allegation of constructive dismissal, based on the purported breach of natural justice, is misplaced and is also duly denied.
>
> Your actions thus far appear to be a deliberate and premeditated attempt on your part to pre-empt and/or prevent a full inquiry into the serious allegations of misconduct made against you. This is also evident from the fact that you chose to lodge a complaint with the Industrial Relations Department (on 19th September 1998) before replying to the show cause letters and further even before your instant allegation of constructive dismissal.

The 1st respondent then maintained she had been constructively dismissed "by your conduct" but again does not state that is was on 7 September 1998 (see p. 162, encl. 6). The applicant denied the allegation of constructive dismissal and deemed the 1st respondent's conduct to be a resignation (see pp. 184-195, encl. 6).

Two final points to be noted on the equivocal stand of the 1st respondent in relation to her purported constructive dismissal on 7 September 1998 are as follows:

(1) Despite her purported claim of constructive dismissal, the 1st respondent continued to occupy the residential premises provided to her by the applicant well after 7 September 1998 and even after 25 September 1998 (see pp. 188-192, encl. 6);

(2) The 1st respondent continued to accept payment of salaries from the applicant for the months of September 1998 and October 1998 (up to 9 October) although she had purportedly been dismissed on 7 September 1998 (see p. 191, encl. 6).

Briefly, at the Industrial Court, the issues raised by the applicant are as follows:

(2a) At the very outset, the Bank will raise the preliminary objection that the Claimant's representation under Section 20 of the Industrial Relations Act 1967 was premature and accordingly the instant action is null and void in law. The Bank contends and will contend that the Claimant failed to comply with Section 20(1A) of the Industrial Relations Act 1967 in that the Claimant's representation to the Industrial Relations Department of her purported constructive dismissal on 19.9.1998 ante-dated her subsequent claim of constructive dismissal (which is denied) on 25 September 1998.

(2b) Further in support of the aforesaid objection, the Bank contends and will contend that the Claimant was paid her gross monthly salary of RM4,720.00 for the month of September 1998 and the sum of RM1,370.32 for the period 2.10.1998 to 9.10.1998.

Accordingly, the Claimant remained an employee of the Bank at all material times and particularly after her representation of constructive dismissal on 19.9.1998.

(2c) It may also noted that the Claimant continued to occupy the residential premises provided to her (in her capacity as Branch manager) by the Bank at 2104B, First Floor, Jalan Sultan Ismail, 20200 Kuala Terengganu, Terengganu after 19.9.1998 and she continues to occupy the said premises to-date. The Claimant's occupation of the said premises post her representation on 19.9.1998 is therefore incompatible with her subsequent stand on 25.9.1998 that she has been constructively dismissed.

(3) In the circumstances, the Bank prays that the instant claim and the reference be dismissed in limine.

(See amended statement in reply, pp. 163-164, encl. 6).

The Industrial Court did not, however, see any merit in the applicant's stand and dismissed the preliminary objection. The relevant parts of the award may be summarised as follows:

> A reading of Section 20(1) clearly discloses that there is no requirement/ duty stated therein for the workman who considers that he has been dismissed without just cause or excuse by his employer to communicate this fact to the employer.
>
> As such the Court therefore finds that there is no statutory requirement/ duty under Section 20(1) of the Act or any other written law for the Claimant to inform the Bank that she had on 7 September 1998 considered herself constructively dismissed before making her representation to the Department. It may have been prudent for her to have done so; it may even be argued that she was under a moral obligation to do so. The Bank even argued that she was under a contractual obligation to do so but no evidence was led in regard to such an issue. As such this Court is unable to be persuaded by the Bank that she is under a legal obligation to do so, and finds that the fact that she only informed the Bank on 25 September 1998 (well after she had made her representation to the Department of Industrial Relations) as not invalidating her claim, to have been constructively dismissed on 7 September 1998.

(see pp. 333-334, encl. 6).

> The Court has perused the Claimants letters of reply to the show cause letters issued by the Bank. The Court finds that the first of these replies of the Claimant (ie, dated 11 September 1998) is a mere denial of the Bank's allegations. It does not seek to actually "show cause" at all. Neither in her second letter (ie, dated 25 September 1998) does she "show cause". In fact this second reply of the Claimant touches upon her constructive dismissal and the representations that she had made to the Department. The Court finds that the two replies of the Claimant far from showing cause, are actually instruments of communication whose purpose is to inform and safeguard her interest. As regards the issue of salary the Claimant argued that this issue was a non starter because it was banked into her account without her solicitations.

(see pp. 334-335, encl. 6).

The Industrial Court therefore essentially found that the 1st respondent's representation was not premature as she was not legally bound to inform the applicant that she deemed herself as having been constructively dismissed before she made the representation under s. 20(1) read with s. 20(1A) of the IRA. The court also found that the 1st respondent's subsequent conduct after her purported constructive dismissal was to be ignored in deciding whether or not her claim of constructive dismissal on 7 September 1988 could be sustained.

The Federal Court has recognised that the supervisory powers conferred on the High Court by virtue of s. 25 of the Courts of Judicature Act 1964 read with para. 1 of the schedule are wide and all embracing. (See *Kumpulan Perangsang Selangor Bhd. v. Zaid bin Haji Mohd. Noh* [1997] 2 CLJ 11). The ambit of the judicial review powers of the court was recently confirmed in the case of *Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjsama-sama Serbaguna Sungai Gelugor* [1999] 3 CLJ 65 at p. 101 where the Federal Court, speaking through Edgar Joseph FCJ, said:

> In our view, therefore, unless there are special circumstances governing a particular case, notwithstanding a privative clause, of the "not to be challenged, etc." kind, judicial review will lie to impeach all errors of law made by an administrative body or tribunal and, we would add, inferior courts. In the words of Lord Denning in *Pearlman v. Harrow School (ibid)* at p. 70, "... no court or tribunal has any jurisdiction to make an error of law on which the decision in the case depends. If it makes such an error, it goes outside its jurisdiction and *certiorari* will lie to correct it."

The High Court is therefore empowered to strike down any decision of an inferior court, which in this case includes the Industrial Court, if it commits any errors of law. As to what amounts to "errors of law", judicial guidance is to be found in the landmark Court of Appeal case of *Syarikat Kenderaan Melayu Kelantan Bhd. v. Transport Workers Union* [1995] 2 CLJ 748 at p. 765 where Gopal Sri Ram JCA expressed the following view:

> It is neither feasible nor desirable to attempt an exhaustive definition of what amounts to an error of law for the categories of such an error are not closed. But it may be safely said that an error of law would be disclosed if the decision-maker asks himself the wrong question or takes into account irrelevant considerations or omits to take into account relevant considerations (what may be conveniently termed an *Anisminic* error) of if he miscontrues the terms of any relevant statute, or mis-applies or mis-states a principle of general law.
>
> Since an inferior tribunal has no jurisdiction to make an error of law, its decisions will not be immunized from judicial review by an ouster clause however widely drafted.

This statement of principle was expressly approved by the Federal Court in *Hoh Kiang Ngan v. Mahkamah Perusahaan Malaysia & Anor.* [1994] 3 MLJ 369 at p. 390. The classic enunciation of the grounds on which errors of law are committed by an inferior tribunal, and thus necessitating the curial intervention of the High Court, was by Lord Diplock in the case of *Council of Civil Service Union & Ors. v. Minister for the Civil Service (CCSU)* [1985] AC 374 at pp. 410-411. It is as follows:

> By illegality ... I mean that the decision-maker must understand correctly the law that regulates his decision-making power and give effect to it ... by "irrationality" I mean what can now be succinctly referred to as "Wednesbury unreasonableness" ... It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it ... I have described the third head as "procedural impropriety" rather than the failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice.

It is pertinent to note also that the scope of judicial review has been expanded by the decision in *R. Ramachandran v. The Industrial Court of Malaysia & Anor.* [1997] 1 CLJ 147 where the Federal Court held that when a decision is challenged as being in error of law on the grounds of irrationality or illegality, the supervisory court is empowered to review the decision not merely for process but for substance as well. (See also *Harris Solid State (M) Sdn. Bhd. v. Bruno Gentil* [1996] 4 CLJ 747). Hitherto, the position was that judicial review concerns only the decision-making process and not the substance or the merits of the decision. This approach has been jettisoned by the Federal Court. (See also *Amanah Butler v. Yike Chee Wah* [1997] 2 CLJ 79).

(A) Grounds In Paras. 4(1), 4(6), 4(7) And 4(8) Enclosure 7

As a starting point, it is necessary to consider ss. 20(1) and 20(1A) of the IRA. They read as follows:

> 20(1) Where a workman, irrespective of whether he is a member of a trade union of workmen or otherwise, considers that he has been dismissed without just cause or excuse by his employer, he may make representations in writing to the Director General to be reinstated in his former employment; the representations may be filed at the office of the Director General nearest to the place of employment from which the workman was dismissed.
>
> 20(1A) The Director-General shall not entertain any representations under subsection (1) unless such representations are filed within sixty days of the dismissal.

Please note that s. 20 of the IRA applies both to cases of outright dismissals and constructive dismissals (See *Ang Beng Teik v. Pan Global Textiles* [1996] 4 CLJ 313). In the context of the instant case before the court, it is crucial that the following points be noted:

(1) Under s. 29(1) of the IRA, a workman must first be "dismissed" without just cause or excuse before he may make representations to the Director-General of Industrial Relations. There must therefore be an act/event amounting to a dismissal of the employee (workman) and only then she would have the legal right under the statute to make the requisite representation.

(2) The legislative intent that there should be a dismissal before the representation is also found in s. 20(1A) which requires the representation to be made "within sixty days of the dismissal".

The statutory regime housed in ss. 20(1) and 20(1A) of the IRA clearly prescribes the "dismissal before representation" formula. Accordingly, where a representation is made before, or precedes, the dismissal, the representation would in law be premature, null and void. Where a representation is premature, the Industrial Court would not be seized with jurisdiction to hear the claim of dismissal based on the representation. This was decided in the case of *Supermix Concrete (M) Bhd. v. Teoh Boon Beng* [1987] ILR 274. In that case, the dismissal was to take effect on 26 March 1986 but the employee made his representation under s. 20(1) on 27 February 1986 ie, before the dismissal. The Industrial Court held that the representation was premature as it preceded the dismissal and thus it did not have jurisdiction to hear matter. The claim was struck off. Please note that the Industrial Court's decision in the *Supermix* case was upheld on appeal by the Supreme Court as confirmed in the case of *Shaw Computers* [1989] 1 ILR 261. The following parts of the *Supermix* decision are important to appreciate the jurisdictional importance of the "dismissal before representation" formula stipulated in the IRA:

> Section 20(1) of the Act envisages a situation that the workman has already been dismissed and it follows from the phrase "to be reinstated in his former employment" and this is followed by another phrase "from which the workman was dismissed.
>
> Section 20(1) is very clear and the court will have to give effect to it, no matter how unjust or unconscionable the result would be.
>
> The phrase "within thirty days of the dismissal" is the operative phrase in this Section. It stipulates the time by which the representation is to be made, ie, thirty days after the dismissal. The word "dismissal" is the key word to this phrase as the concept of effective date of dismissal is very important in that it indicates when the workman is to make the representation and also the time starts to run from that effective date of dismissal.
>
> *(Please note that the "thirty days" requirement has now been replaced by "sixty days" in s. 20(1A) of the IRA by Act A 718).*

> The provision of Section 20(1) of the Act has been strictly interpreted, and it follows, therefore the Claimant should in this case make his representation "after the dismissal".
>
> From the circumstances of this case and in the strict interpretation of s. 20(1) of the Act, the Claimant was not yet dismissed, therefore his representation was premature, within the working period, and as such the Court is not seized with jurisdiction.

The Industrial Court [2000] 2 ILR 178 correctly accepted that it would have no jurisdiction to hear a premature claim. This is what the court said:

> Counsel for the Bank did refer to the decision of *Supermix Concrete (M) Sdn. Bhd. v. Teoh Boon Beng* [1987] ILR 274 in which it was held that the Court had no jurisdiction to entertain a premature representation. This decision was applied and followed in the following cases – *Compagnie Du Combodge Kedah v. Sinnaperumal a/l Munusamy, Kedah* [1988] 2 ILR 212, *Show Computer and Management Services Sdn. Bhd. v. Cheong Kiew* [1989] 1 ILR 261 and *Grafikom (M) Sdn. Bhd. v. Lee Mun Wai* [1988] I ILR 382.
>
> The law is therefore well stated and if the Court finds that the Claimant did in fact make a premature representation then it has to allow the preliminary objection. The questions therefore that have to be determined by the Court would be as to when the Claimant considered herself constructively dismissed and when she made the representation to the department.

However, the Industrial Court found that the 1st respondent's claim in the instant case was not premature. This finding is found at p. 336, encl. 6:

> The Court is satisfied that the Claimant did claim to have been constructively dismissed on 7 September 1998, which date preceded her representations to the Department on 19 September 1998.

I am of the opinion that the Industrial Court acted in error of law and in excess of jurisdiction when it decided that the 1st respondent's claim was not premature. The sole basis for its finding is found at pp. 331-332, encl. 6 and it reads:

> The Claimant refers to the letter dated 27 August 1999 from the Department to the Industrial Court in which the Minister referred the Claimant's representation to the Court under Section 20(3) for decision. This letter which is exhibit NKL "1" of the Amended Statement of case, is headed as follows:
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> > Rujukan ke Mahkamah Perusahaan oleh Y.B. Menteri Sumber Manusia Mengenai Pembuangan Kerja Cik Ng Keng Lian, 1829, Jalan 11, Taman Padang Maidin, 21400 Kuala Terengganu, Terengganu oleh Southern Bank Berhad, 104A & B, Jalan Sultan Ismail, 20200 Kuala Terengganu, Terengganu pada 7 September 1998.

Paragraph 2 of that letter specifically states that the Claimant's representations were received by the Industrial Relations Department on 19 September 1998. The representations were made under Section 20(1) of Act 177 in regard to her claim to have been constructively dismissed, 7.9.1998.

In arriving at this conclusion, the Industrial Court failed to take into account the following undisputed facts which plainly vitiates the finding that the 1st respondent was constructively dismissed on 7 September 1998:

(1) There was no document or letter at all from the 1st respondent – employee to the applicant – where she took the stand that she was constructively dismissed on 7 September 1998;

(2) The 1st respondent in fact took the position for the first time that she was constructively dismissed on 25 September 1998 in her letter of the same date (see p. 22, encl. 6). The Industrial Court completely ignored the legal effect of this letter which clearly fixes the date of the purported constructive dismissal at 25 September 1998. And, it is all the more incredible that the Industrial Court should disregard this letter given that this was the only document emanating from the 1st respondent where she makes her stand clear on the matter;

(3) The 1st respondent's conduct in responding to the show cause letters on 20 September 1998 and 22 September 1998 (see her letters at pp. 30 and 31, encl. 6) was also inconsistent with her stand that she was constructively dismissed on 7 September 1998. An employee who considers herself as having been constructively dismissed would not be replying to show cause letters at all. Indeed, an employee who is no longer in the employ of an employer, or who considers herself to be no longer in the employ of the employer, is not subject to any form of disciplinary process (eg, show cause letters) initiated by the employer (see *S.P. Tiwari v. State of Bihar* [1993] II LLJ 1162 at pp. 1163-1164);

(4) If the 1st respondent's considered herself constructively dismissed from 7 September 1998, why did she continue to occupy the residential premises provided by the bank as well as receive salaries well after 7 September 1998.

I think that there was sufficient evidence before the Industrial Court for it to have found that the 1st respondent had only deemed herself as having been constructively dismissed on 25 September 1998. It was also clear as a matter of law that the 1st respondent could not have deemed herself as having been constructively dismissed on 7 September 1998. Thus the only reasonable finding that the Industrial Court could have arrived at on the totality of the evidence placed before it would have been that she had in

fact only considered herself as having been constructively dismissed on 25 September 1998. It is well established that in judicial review proceedings the High Court can disagree with the Industrial Court on the conclusions or inferences drawn by the Industrial Court from the evidence placed before it on the ground that no reasonable tribunal similarly circumstanced would have arrived at such a conclusion. This principle was restated recently by the Court of Appeal in *Airspace Management Services Sdn. Bhd. v. Col. (B) Harbans Singh* [2000] 4 CLJ 77 at p. 86 as follows:

> On the other hand, we accept, of course, that is entirely competent for the High Court in *certiorari* proceedings to disagree with the Industrial Court on the conclusions or inferences drawn by the latter from the proved or admitted evidence on the ground that no reasonable tribunal similarly circumstanced would have arrived at such a conclusion or drawn such an inference. An erroneous inference from proved or admitted facts is an error of law; not an error of fact. If authority is required for that proposition it may be found in the judgment of Gill J (later CJ (Malaya)) in *Govinda Mudaliar & Sons v. Govindasamy* [1967] 2 MLJ 5.

The earlier Court of Appeal's decision of *Amanah Butler v. Yike Chee Wah* [1997] 2 CLJ 79 also has reference. I am of the opinion that the Industrial Court's finding that the 1st respondent had deemed herself as having been constructively dismissed on 7 September 1998 was an erroneous factual conclusion on the totality of the evidence placed before it. It was also a conclusion that is not reasonably supported by the evidence taken as a whole. On either base, the finding is unsustainable. Authority for these propositions are found in the judgment of Edgar Joseph Jr. FCJ in the *Ramachandran* case (at p. 214):

> However, like most principles, there are important exceptions, which tend to blur the conceptual distinction between errors of law and fact. Two of these exceptions which are relevant to the present case must be mentioned; they are:
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> (i) Reliance upon an erroneous factual conclusion may itself offend against the principles of illegality or irrationality enunciated by Lord Diplock in *Council of Civil Service Unions & Ors. v. Minister for the Civil Service* [1985] AC 374. Indeed, in *R v. Hillingdon LBC, ex p Puhlhofer*, Lord Brightman made this clear by adding to the passage in his judgment cited above, 'save in a case where it is obvious that the public body, consciously or unconsciously, are acting perversely.'
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> (ii) Where there is no evidence to support a conclusion, there is necessarily an error of law in the decision arrived at (see *Edwards v. Bairstow* [1956] AC 14; *Din (Taj) v. Wandsworth LBC* at p. 664H, per Lord Wilberforce; *R v. Hillingdon LBC, ex p Islam (Tafazzul)* [1983] 1 AC

688 at p. 708D, per Lord Wilberforce and at p. 717G, per Lord Lowry).

But, as Wade and Forsyth *Administrative LasAdministrative Law* (7th edn. 1994) have correctly pointed out at p. 312:

> "No evidence" does not mean only a total dearth of evidence. It extends to any case where the evidence, taken as a whole, is not reasonably capable of supporting the finding (see *Allison v. General Council of Medical Education and Registration* [1894] 1 QB 754 at pp. 760, 763; *Lee v. The Showmen's Guild of Great Britain* [1951] QB 319 at p. 345), or where, in other words, no tribunal could reasonably reach that conclusion on that evidence (see *R v. Roberts* [1908] 1 KB 407 at p. 423). This "no evidence" principle clearly has something in common with the principle that perverse or unreasonable action is unauthorised and *ultra vires*.

It is therefore I come to the conclusion that the Industrial Court should have found in the instant case that the 1st respondent's purported constructive dismissal was with effect from 25 September 1998. Accordingly, it would follow, and the Industrial Court should have held, that her representation on 19 September 1998 was premature as it ante-dated her claim of constructive dismissal of 25 September 1998. It was therefore open to the Industrial Court to hold that it did not have jurisdiction to hear the 1st respondent's premature claim and the claim ought to have been struck off in limine. Its failure to do so was an error of law.

(B) Ground In Paras 4(2), 4(3), 4(4) and 4(5), Enclosure 7

Next, the Industrial Court having erroneously held that the 1st respondent had considered herself as having been constructively dismissed on 7 September 1998 and thus having erroneously assumed jurisdiction, went on to decide that she was not obliged in law to inform the applicant (her employer) of her stand (that she was purportedly constructively dismissed on 7 September 1998) before she made the representation on 19 September 1998. This is found at pp. 333-334, encl. 6 and it may be recalled that the Industrial Court said:

> As such the Court therefore finds that there is no statutory requirement/ duty under Section 20(1) of the Act or any other written for the Claimant to inform the Bank that she had on 7 September 1998 considered herself constructively dismissed before making her representation to the Department. It may have been prudent for her to have done so; it may even be argued that she was under a moral obligation to do so. The Bank even argued that she was under a contractual obligation to do so but no evidence was led in regard to such an issue. As such this Court is unable to be persuaded by the Bank that she is under a legal obligation to do so, and finds that

> the fact that she only informed the Bank on 25 September 1998 (well after she had made her representation to the Department of Industrial Relations) as not invalidating her claim, to have been constructively dismissed on 7 September 1998.

It may be noted that before arriving at the conclusion above (at pp. 333-334, encl. 6), the Industrial Court correctly accepted that the legal test for constructive dismissal in Malaysia was the common law "contract test". This is seen at p. 300. encl. 6:

> The Claimant referred to the Federal Court case of *Wong Chee Hong v. Cathay Organisation (M) Sdn. Bhd.* [1988] 1 MLJ 92 and the Court of Appeal cases of *Ang Beng Teik v. Pan Global Textile Bhd. Penang* [1996] 3 MLJ 137, and *Anwar bin Abdul Rahim v. Bayer (M) Sdn. Bhd.* [1998] 2 MLJ 599, which concisely state the law regarding constructive dismissal. Suffice to say the test in regard to constructive dismissal is now the contract test ie, "whether the conduct of the employer was such that the employer was guilty of a breach going to the root of the contract or whether he has evinced an intention no longer to be bound by the contract."

However, the Industrial Court then erroneously refused to apply the contract test to the issue before it, namely whether notice to the employer of the purported constructive dismissal was required under s. 20(1) read with 20(1A) of the IRA before the representation can be made. This is found at p. 330, encl. 6:

> Having regard to the limited scope permitted in regard to preliminary objections, the Court rejects the argument that for the purposes of deciding on the preliminary objection, it should at this stage also determine whether the elements of the contract test were met.

The Industrial Court then embarked on a very literal and ultimately superficial approach to the issue and held that:

> A reading of Section 20(1) clearly discloses that there is no requirement/ duty stated therein for the workman who considers that he has been dismissed without just cause or excuse by his employer to communicate this fact to the employer.

By first accepting that the contract test was applicable to constructive dismissal cases and then by declining to apply the established principles under the test to the issue before it, the Industrial Court took a mutually contradictory stand. In the result, there was a fundamental error of law and jurisdiction in the approach adopted by the Industrial Court that vitiated its award. I am of the opinion that the word "dismissed" in s. 20(1) of the IRA includes "constructive dismissal". (see again the *Pan Global* case, *supra*). And, in determining questions on a constructive dismissal under s. 20(1) of the IRA common law principles, *viz*, the contract test as

propounded in the *Wong Chee Hong* case, are to be applied. This was made clear in the case of *Holland v. Glendale Industries Ltd* [1998] ICR 493 at 497 in the equivalent provision in England where it was said:

> In our view, however, Section 95(1)(c) must be considered in the light of the ordinary principles of contract.

This position was reiterated in *Chirstoph Hoezl v. Langkawi Island Resort Sdn. Bhd.* [1998] 6 MLJ 162 at p. 167 where it is stated:

> The common law recognises the right of an employee to terminate his contract of service and therefore to consider himself as discharged from further obligations if the employer is guilty of such breach as affects the foundation of the contract or if the employer has evinced or shown an intention not to be bound by it any longer (see *Wong Chee Hong v. Cathay Organisation (M) Sdn. Bhd* [1988] 1 CLJ 45; [1988] 1 CLJ (Rep) 298) In the same case, the (then) Supreme Court also decided that the word "dismissal" in Section 20 of the Industrial Relations Act 1967 should be interpreted with reference to the common law principle, *viz*:
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> > We think that the word "dismissal" in this section should be interpreted with reference to the common law principle. Thus, it would be a dismissal if an employer is guilty of a breach which goes to the root of the contract of if he has evinced an intention no longer to be bound by it. In such situations, the employee is entitled to regard the contract as terminated and himself as being dismissed. (See *Bouzourou v. The Ottoman Bank* [1930] AC 271 and *Donovan v. Invicta Airways Ltd.* [1970] 1 Lloyd's Rep 486).

It may be noted that the common law contract test was accepted as the correct test for cases of constructive dismissal by the Court of Appeal in *Anwar bin Abdul Rahim v. Bayer (M) Sdn. Bhd.* [1998] 2 CLJ 197. This is what the Court of Appeal said (per Mahadev Shankar JCA):

> It has been repeatedly held by our courts that the proper approach in deciding whether constructive dismissal has taken place is not to ask oneself whether the employer's conduct was unfair or unreasonable (the unreasonableness test) but whether "the conduct of the employer was such that the employer was guilty of a breach going to the root of the contract or whether he has evinced an intention no longer to be bound by the contract." (See *Holiday Inn, Kuching v. Elizabeth Lee Chai Siok* [1992] 1 CLJ 141; [1992] 2 CLJ (Rep) 521 and *Wong Chee Hong v. Cathay Organisation (M) Sdn. Bhd.* [1988] 1 CLJ 45; [1988] 1 CLJ (Rep) 298).

Please note that the decision of the Court of Appeal in *Anwar bin Abdul Rahim* was upheld on appeal by the Federal Court as confirmed in *Funai Electric (M) Sdn. Bhd. v. Saliah bte Ahmad* (unreported).

As the common law contract test is applicable to all cases of constructive dismissal, it was incumbent on the Industrial Court to apply the test for the purposes of determining the issue before it. In doing so, the approach that the Industrial Court should have taken is to ask itself whether under the common law contract test there was a duty on the employee to inform her employer that she deemed herself as having been constructively dismissed before she made the representation. I think that the failure on the part of the Industrial Court to distill the correct principles and apply them to the issue before it by asking itself the correct question, was patently an error of law. The Court of Appeal said so in the *Syarikat Kenderaan Melayu Kelantan Bhd*. case, *supra* at p. 745:

> But an error of law would be disclosed if the decision maker asks himself the wrong questions or takes into account irrelevant considerations, or omits to take into account relevant consideration, of if he misconstrues the terms of any relevant statute, or misapplies or mis-states a principle of the general law.

Under the common law contract test to be applied in constructive dismissal cases, the question for the court to determine is whether the employer is guilty of a breach which goes to the root of the contract of employment or whether the employer has evinced an intention no longer to be bound by the contract of employment. If the answer is in the affirmative in either case, then the employer is said to have repudiated the contract of employment and the employee would be entitled to regard herself as having been constructively dismissed. (See *Wong Chee Hong*'s case, *supra*). However, for the employee to rely on the repudiatory breach of the employer and deem herself constructively dismissed, she must first inform the employer by words or conduct, or both, that she was accepting the repudiation and treating the contract of employment as having been terminated by the employer. In the case of *Holland v. Glendale Industries Ltd.* [1998] ICR 493, the failure on the part of the employee to inform the employer that he considered himself as having been constructively dismissed proved fatal to the claim. The ratio of the case may be culled from the headnotes (at p. 493) and it reads as follows:

> ... where one party to a contract by his conduct repudiated the contract and the other wished to rely on such repudiation, the latter must by words and/or conduct make it plain that he was accepting the repudiation; ... accordingly, an employee who did not make it clear to his employers that he was leaving their employment because of their conduct towards him was not constructively dismissed within the meaning of that subsection;

Thus, under the common law contract test it is a legal requirement in constructive dismissal cases for the employee to inform her employer that she deemed herself of having been constructively dismissed before she initiated any action against the employer. This basic principle was recently re-stated in the important case of *Edwards v. Surrey Police* [1999] IRLR 456 as follows:

> Before a contract of employment can be terminated, there must have been communication by words, or by conduct, such as to inform the other party to the contract that it is at an end. An employee alleging constructive dismissal, therefore, must communicate to the employer the fact that they are terminating their employment. It is not an infrequent occurrence that employees find their working life intolerable, walk out in a huff, but do not intend to bring their employment relationship to an end. Unless there has been a proper communication by the employee of the fact that they are regarding themselves as no longer employed, whether by words or conduct, their employment relationship has not terminated.

The principle was also fully explained in the body of the judgment as follows:

> That argument was firmly rejected and (if we might say so with respect) rightly so, on the basis that, as Mr. Linden so happily put it, the statutory definition of the effective date of termination, and when a termination takes effect, is not to be surrounded by the subtleties of the law of contract on these sort of issues. But it does not follow that because the doctrine of repudiation and acceptance may not fit in easily with the termination of an employment relationship, a communication of a termination is not a prerequisite to the termination of a contract of employment.
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> It seems to us perfectly clear, as a matter of general principle that before a contract of employment can be terminated there must have been communication by words, or by conduct, such as to inform the other party to the contract that it is indeed at an end.

ln the local case of *Moo Ng v. Kiwi Products Sdn. Bhd. Johor* [1998] 3 CLJ 475 at p. 496, the High Court also accepted that there was a legal requirement to inform the employer before the employee walks out claiming constructive dismissal:

> In *Pexxon Sendirian Berhad v. Sia Qui Yau, Johor* [1989] 1 ILR 235, the Industrial Court once again applied the case of *Wong Chee Hong v. Cathay Organisation (M) Sdn. Bhd. (supra)* and concluded as follows (see p. 240 of the report):

> So the length of time is a crucial factor by which the Claimant must act to repudiate the contract based on the breach, that goes to the root of that contract. The period of one month has been held to be unreasonable for the Claimant not to have acted against his employer. It seems that once an employee has discovered that there is substantial breach or breaches of employment that goes to the root of the contract of the employment he must so act immediately either by protesting or giving notice to the employer and walking out of the job, otherwise he might be said to have affirmed the new term of the contract, thereby accepting it with the terms added. All this is to be decided on the facts of each case.

It is therefore clear that it was necessary for the 1st respondent to have first informed the applicant of her stand before she made the representation. Otherwise, as a matter of law, the employment relationship would not have terminated. In the *Edward*'s case, *supra*, the court emphasised the requirement of notice to the employer, before the employment contract may be treated as terminated, as follows:

> It seems to us that employers should know where they stand when an employee leaves. In this case, the employers appear to have written a letter which was, at the least, compatible with the employment relationship continuing until the date when they received the letter from the employee. It is not an infrequent occurrence that employees find their working life intolerable, walk out in a huff, but do not intend to bring their employment relationship to an end. It seems to us that, unless there has been a proper communication from the employee of the fact that they are regarding themselves as no longer employed, whether by words or conduct, their employment relationship had not terminated.

Thus, when the 1st respondent made the representation on 19 September 1998 without having first informed the applicant of her stand, she could not in law claim to have been constructively dismissed. Her claim was only with effect from 25 September 1998, by which time she had made the representation. The representation was therefore premature. I therefore come to the conclusion that the Industrial Court did not properly direct itself on the law when it decided that there was no duty on the part of the 1st respondent to inform her employer that she considered herself as having constructively dismissed before she made the representation. The decision of the Industrial Court was therefore unreasonable in the "Wednesbury sense" and cannot be sustained. The "unreasonableness" here was explained in the Supreme Court case of *Harpers Trading (M) Sdn. Bhd. v. National Union of Commercial Workers* [1991] 2 CLJ 881 at p. 889 ([1991] 1 CLJ (Rep) 159) (at p. 168) as follows:

So is Lord Greene MR's speech in the *Wednesbury Corp* case at p. 229, explaining the meaning of "unreasonableness" in its broad or comprehensive sense:

> I am not sure myself whether the permissible grounds of attack cannot be defined under a single head. It has been perhaps a little bit confusing to find a series of grounds set out. Bad faith, dishonesty – those of course, stand by themselves – unreasonableness, attention given to extraneous circumstances, disregard of public policy and things like that have been referred to, according to the facts of individual cases, as being matters which are relevant to the question. If they cannot all be confined under one head, they at any rate, I think, overlap to a very great extent. For instance, we have heard in the case a great deal about the meaning of the word "unreasonableness".
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> It is true the discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word "unreasonable" in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with discretion must, so to speak, direct himself properly in law. He must call his own attention to the matter which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably".

Accordingly, the finding of the Industrial Court that there was no legal requirement for the 1st respondent to have informed the applicant of her stand, that she was constructively dismissed, before she made the representation was flawed and devoid of any plausible justification. It cannot therefore be sustained and must be quashed. I also rely on the Federal Court's case of *Wong Yuen Hock v. Syarikat Hong Leong Assurance* [1995] 3 CLJ 344 for the following legal proposition:

> In exercising judicial review, the High Court was obliged not to interfere with the findings of the Industrial Court unless they were found to be unreasonable, in the sense that no reasonable man or body of men could reasonably come to the conclusion that it did, or that the decisions of the Industrial Court looked at objectively, were so devoid of any plausible justification that no reasonable person or body of persons could have reached them (see Lord Denning's judgment in *Griffiths (Inspector of Taxes) v. JP Harrison (Watford) Ltd.* [1962] 1 All ER 909 at p. 916), and judgment of Lord Diplock in *Bromley London Borough Council v. Greater London Council & Anor.* [1983] 1 AC 768 at p. 821; [1982] 1 All ER 153 at p. 159; [1982] 2 WLR 92 at p. 100.

In the ultimate analysis, the decision of the Industrial Court on the issue before it was clearly irrational, illegal and a nullity as it:

(i) Failed to properly address its mind to the sole issue at hand;

(ii) Failed to consider the evidence in its totality when it decided that the claim was premature; and

(iii) Failed to distill the correct legal principles under the contract test for constructive dismissal cases and apply the principles to the issue in question.

For these reasons I grant order in terms of (a) of encl. 8 and cost.